



April 20, 2017

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

BY FOIA ONLINE

BY EMAIL: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

Re: FOIA Request Regarding Ozone Standards

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), we request copies of the following records<sup>1</sup> in EPA's possession:

Any and all records of communications subsequent to November 7, 2016, regarding the national ambient air quality standards for ozone between (A) people and organizations outside EPA and (B) members of the transition, beachhead, and landing teams in any EPA office and EPA staff in the Office of the Administrator (Immediate Office), Office of Congressional and Intergovernmental Relations, Office of the Executive Secretariat, Office of Policy, Office of Public Affairs, Office of Air and Radiation, and Office of General Counsel.

Relevant search terms include, but are not limited to, "ozone standard," "ozone standards," "ozone NAAQS," "national ambient air quality standard for ozone," "national ambient air quality standards for ozone," and all of those phrases with the word "ozone" replaced by the term "O3."

It may be possible for us to further limit this request if we have a better idea of the nature and scope of the records in your files. Please contact me to discuss this possibility. In addition, to the extent that records responsive to this request are available in a widely-used electronic format (*e.g.*, pdf, Excel, Word, or WordPerfect files), we would prefer to receive them in that format, provided that the electronic versions are in comprehensible form.

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<sup>1</sup> As used throughout this letter, the terms "record" and "records" shall mean all materials in whatever form (handwritten, typed, electronic, or otherwise produced, recorded, reproduced or stored) in EPA's possession, including, but not limited to, any correspondence, minutes of meetings, memoranda, notes, e-mails, notices, electronic files, internet chat logs, tapes, photos, videos, text messages, and telefaxes. Note that this request specifically seeks responsive records in or on the personal computers, cellphones, or other devices, or personal email accounts used by any federal employee or official if used for any government purpose.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens and advancing the purposes of the Clean Air Act.

We also request that responsive records be released as soon as they are available, on a rolling basis, but in no event later than 20 days, as required by law. To the extent that some subset of the requested records is readily available and can be provided immediately, please send it immediately while EPA searches for other records.

### REQUEST FOR FEE WAIVER

This FOIA request is submitted by Earthjustice, a nonprofit environmental law organization. Earthjustice uses legal advocacy and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change.

Earthjustice requests that you waive all fees in connection with this matter. As shown below, Earthjustice meets the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the EPA's fee waiver regulations at 40 C.F.R. § 2.107. In particular, disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

#### I. THE SUBJECT OF THE REQUESTED RECORDS CONCERNS "THE OPERATIONS OR ACTIVITIES OF THE GOVERNMENT."

The subject matter of this request relates to the review and implementation of environmental regulations and policies affecting public health and welfare. It is clear that such actions, as well as EPA's overall implementation and execution of environmental laws, are specific and identifiable activities of an executive branch agency of the government. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) ("[R]easonable specificity" is "all that FOIA requires" with regard to this factor). Thus, this FOIA request plainly concerns the operations or activities of the government.

##### A. The disclosure is "likely to contribute" to an understanding of government operations or activities (the informative value of the information to be disclosed).

There is no question that the records requested will contribute to an understanding of federal government operations. The request likely will result in disclosure of records not already in the public domain. The requested records will provide important information regarding input to EPA's decisionmaking by parties that have an interest in the outcome of that decisionmaking, as well as the development of EPA's public statements about a matter of great public concern—the health- and welfare-protective national ambient air quality standards for ozone. Such information will allow better understanding of government operations, and in particular, who is attempting to influence EPA action, and responses by EPA to such attempts. The records are

likely to also disclose what reasons EPA might have for taking or not taking certain actions in regard to the environmental and human health impacts that it oversees. These records are not publicly available as a general matter. Thus, production of the requested records is “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552 (a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2).

In this instance, the requested records will likely provide new information about communications by and input from industries and others regarding EPA’s actions to implement the nation’s key environmental laws. *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987) (FOIA’s legislative history “suggests that information has more . . . potential [to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations.”). Accordingly, the records sought by this request will provide important oversight of EPA operations by revealing the extent to which such interests are attempting to influence EPA policy, and EPA’s response to those attempts. *See Community Legal Services v. HUD*, 405 F. Supp. 2d 553, 560 (E.D. Pa. 2005) (“[T]he CLS request would likely shed light on information that is new to the interested public.”).

B. The disclosure of the requested information will contribute to “public understanding.”

The information requested will contribute to public understanding of the involvement of outside entities in efforts to affect the protections provided by and through the national ambient air quality standards for ozone, as well as EPA’s response thereto. The information requested will also help provide Earthjustice, its supporters, and the public that Earthjustice disseminates information to with insight into what outside entities are seeking to influence the agency, the kinds of input EPA policymakers are or may be receiving directly or indirectly from these outside entities, and EPA’s responses thereto. The records’ release is not only “likely to contribute,” but is in fact certain to contribute significantly to better public understanding of the operations or activities of the government as described above. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2).

Public understanding of the new information will be achieved because Earthjustice intends to use the new information that it receives to educate the public by informing the public about the above-described communications.

In determining whether the disclosure of requested information will contribute to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dep’t of Justice*, 19 F.3d 807 (2d Cir. 1994). Earthjustice need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law requir[es] such pointless specificity.” *Judicial Watch*, 326 F.3d at 1314. It is sufficient for Earthjustice to show how it distributes information to the public generally. *Id.*

Earthjustice is a non-profit organization that informs, and educates the public regarding issues, policies, and laws relating to the environment. Earthjustice has been substantially

involved in such activities for years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

Earthjustice possesses the expertise to explain the requested information to the public and the ability to disseminate the requested information to the general public (*e.g.*, Earthjustice has attorneys and other professionals who have the ability to assess and digest the requested information, and Earthjustice has the capacity to publish reports regarding that information). In addition, Earthjustice's informational publications are disseminated to the media and are available on Earthjustice's website to the general public.

Concurrent with any action which Earthjustice may take after obtaining the requested records, Earthjustice intends to publicize the significance of the matters that are the subject of the communications disclosed, the nature of the concerns and positions expressed in those communications, and EPA's reaction thereto. This is certain to result in a significant increase in public understanding of government agency activity. Earthjustice has publicized agency activities with respect to implementation of various environmental laws many times through information gained from FOIA requests like this one. Earthjustice intends to use the records sought in this request in a similar manner. Information such as that presently requested is often disseminated through Earthjustice's newsletter, which is sent to approximately 1.2 million people monthly, Earthjustice's website, news releases, and social media outlets including Facebook, Twitter and Instagram. Earthjustice's informational publications continue to contribute information to public media outlets, as well. Information concerning the communications described in this request will likely be disseminated through all of these means. The courts have recognized that similar information distribution activities are likely to contribute to public understanding of government operations and activities. *See Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians 'publishes an online newsletter, which is e-mailed to more than 2,500 people' and stated that it 'intend[s] to establish an interactive grazing web site' with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

C. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

The foregoing discussion makes clear that disclosure is likely to provide new information to the public that will contribute significantly to its understanding of the review and implementation of environmental and public health protections established by the government. The request seeks information that is not publicly available about, among other things, who is seeking to influence EPA's regulatory actions, the extent of those efforts, and the effectiveness of their attempts to do so, and Earthjustice has a track record of disseminating information regarding issues, policies, and laws relating to the environment and public health. Accordingly, the requested records are likely to contribute significantly to public understanding of government operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(I)(2).

## II. EARTHJUSTICE HAS NO COMMERCIAL INTEREST IN OBTAINING THE INFORMATION.

Access to government records and similar materials through FOIA requests is essential to Earthjustice's role of educating the general public. Earthjustice, a non-profit, 501(c)(3) organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

For all the foregoing reasons, dissemination of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government. Accordingly, we request that you waive all fees in connection with this request pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

If you deny this fee waiver request, in whole or in part, please notify us before incurring search and copy expenses.

### CONCLUSION

Please email or (if it is not possible to email) mail the requested records to me at the office address listed below. Please send them on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

If you find that this request is unclear in any way, or that the number of records responsive to this request is relatively large or difficult to copy, please do not hesitate to call me at 202-797-5245. You can also reach me by email at: [sjohnson@earthjustice.org](mailto:sjohnson@earthjustice.org).

Thank you for your assistance.

Sincerely,

/s/Seth L. Johnson

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